Filed 11/18/16 P. v. Collin CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAMES LOUIS COLLIN, Defendant and Appellant.	A144836 (Contra Costa County Super. Ct. No. 051319599)

On June 26, 2012, 62-year-old James Louis Collin used a machete to kill Evangeline Devera, the 51-year-old woman with whom he lived. A jury found him guilty of second degree murder involving the personal use of a deadly weapon (Pen. Code, §§ 187, 12022, subd. (b)(1)), for which he was sentenced to state prison for the statutory terms of 16 years to life. Defendant contends the trial court abused its discretion in connection with two evidentiary rulings, and failed in its sua sponte duty to instruct the jury on the defense of unconsciousness. We reject these contentions and affirm the judgment of conviction.

BACKGROUND

The essential aspects of the murder are not in dispute, and defendant does not claim the evidence is insufficient to support the verdict. Most pertinently, he has never denied being responsible for the victim's death. Viewed most favorably to the prosecution (*People v. Manibusan* (2013) 58 Cal.4th 40, 87), the trial record establishes the following:

On the afternoon of June 26, 2012, defendant approached his next door neighbor and told him he had killed Devera. Defendant was holding a bloody machete. Blood was on his face. Defendant was arrested minutes later, after being seen walking down the street with blood on his face and clothing. The victim's body was discovered on the kitchen floor in defendant's house. Considerable blood splatter was present, including on the kitchen ceiling. A bloody machete was found at the neighbor's house. According to the coroner, the machete was used to inflict two "deep chop wounds" to the skull that caused death. The machete was also the cause of numerous other nonlethal wounds on the victim's body. Her left hand was almost completely severed.

The gist of defendant's lengthy testimony was that the victim was his long-term romantic object; that their relationship could be tempestuous (as evidenced by his 2006 conviction for domestic violence); that most of the fights were initiated by the victim, often featuring thrown objects and knives; and that their final confrontation stayed true to that pattern: it was the victim who began things by attacking him with a large knife. He was carrying a machete that he'd been using for garden work. She had put down the knife and was merely yelling at defendant—albeit in a "furiously mad" manner—when defendant began to think "I was going to pass out" in the kitchen, and defendant "started getting flashbacks of the things that she'd done to me . . . it was . . . like a collage in my mind."

As he described it: "She started to back up and go for . . . where the knife block was. [¶] . . . [¶] I remember having the machete in my hand and I remember that it was a strange feeling. The machete didn't seem to have any weight to it . . . . I know I had it in my hand, but I couldn't feel the machete. [¶] . . . [¶] I remember raising it, but I do not remember [it] . . . coming down and striking her. . . . I do remember raising the machete. She did not have a knife in her hand at that time." When asked by his counsel "What's the next thing that you remember?" defendant answered: "I have no recollection anymore of the house. I remember walking down the street" with the machete in his hand, intending to tell a neighbor what had happened when "It started to sink in . . . what I'd done. [¶] . . . [¶] That I killed Eva." Defendant told the neighbor "I think I killed

Eva," and asked him to call 911. After seeing the neighbor do so, defendant began walking back to his home when officers arrived and apprehended him. Defendant did not recall the victim crying out as she was being hit with the machete. According to defendant, he did not mean to strike her, and "there was no intent on killing her." What happened was self-defense, "because she was going for the knife."

Following his arrest, defendant was taken to a police station and—following appropriate constitutionally-required admonitions—interrogated at length. During the course of the questioning, defendant remembered hitting the victim with the machete, and he demonstrated how he "whacked" her with it.

DISCUSSION

Evidence Regarding Defendant's Shooting Of His Brother

During his direct examination, defendant testified that he remembered speaking "with police officers at the Orinda police station after the event," but he did not recall how long that interview lasted. "I was so upset. I just don't—I just—I knew what happened, but it's just—*I've never been in a position like this in my life*." (Italics added.) The trial court treated the italicized language as opening the door to a subject it had previously ruled inadmissible: defendant shooting and killing his brother in 1986, a shooting that was treated as an accident and for which no charges were filed.

Defense counsel argued that "the situation is completely different in that here it's obviously not an accident and he's in a situation trying to explain why he committed this heinous act," so "an accidental shooting is not probative in this case." Further, "It will simply inflame the jury. We have no evidence that it wasn't an accidental shooting. . . . [I]t would be inappropriate to go into it . . . and would taint the trial," so that "on 352 grounds it's inadmissible. "

The trial court ruled that cross-examination by the prosecution would be permitted: "I wrote this down in great detail because I found it to be strikingly contrary to what the truth is. For the defendant to say, 'I've never been in a position like this in my life' is absolutely an untruth.

"And it is unfair, frankly, to give the jury the impression that the defendant hasn't been in a position like this in his life when he proffered it up for the Court and for the jury . . . to minimize or justify the fact that his interview was different than the testimony that he's giving in court today.

"So with that said, I believe that the door was opened very widely by the defendant himself on direct, it wasn't coaxed out of him on cross, it came out on direct."

"A 352 analysis, you know, initially I felt it was relevant at the outset . . . . But I believe that there was enough of a possibility that it was an accident, I think there's equally a possibility that it was not. But I don't know how that's going to come out or where Ms. Knox [the prosecutor] is going to question him, but I would ask that you keep your questions just to the fact that it's a position that he's been in before in his life, not about whether or not he committed a murder with regard to his brother. I don't want a mini-trial on that.

"And therefore because it was a death, it certainly is the exact same position, and therefore it's appropriate for Ms. Knox to question the defendant about it." "I'm finding the probative value, which is the defendant's veracity, outweighs the prejudicial value of this. I do not believe this would confuse the jury, mislead them, in any way."

When defendant resumed his direct examination, his counsel introduced the subject in an attempt to pre-empt the prosecution. Counsel got defendant to concede that his earlier statement about being interrogated by police was not literally true because "you were interviewed by the police when you killed your brother." However, "I was never taken down to the police department. I was never handcuffed. I was never—had a gun put in my face." The earlier questioning was "totally different" in that "it was not an interview . . . it was just—they were asking me questions . . . . My parents were there" while he sat at the dining room table. The circumstances of the shooting were then explored: it was a "[h]orrible accident" that occurred in 1986 when he (defendant) was checking if discarded shotgun shells he had collected could be used in the family shotgun. Defendant was never charged for the shooting.

Defendant's first contention is that the trial court's ruling was prejudicial error, because the trial court "had no discretion to admit . . . this improper propensity evidence." We do not agree.

Initially, we must question defendant's characterization that what the court authorized was "propensity evidence." It clearly was not, because it was not "offered to prove his . . . conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) Nor was it allowed as such. The jury was explicitly instructed as to the precise—and limited—relevance of the testimony concerning "the 1986 death of the defendant's brother": "you may consider this testimony *only* in evaluating the credibility of the defendant's testimony. *Do not consider this evidence for any other purpose*." (Italics added.) We presume the jury complied with this admonition. (*People v. Jablonski* (2006) 37 Cal.4th 774, 834.)

The point of informing the jury of defendant's shooting of his brother was to impeach his testimony that he had never been exposed to sustained custodial interrogation and thus may have made some imprudent statements or incriminating admissions. Evidence to accomplishing that goal would undoubtedly be relevant to prevent defendant from wrapping himself in a false aura of veracity. (See Evid. Code, §§ 785–786; *People v. Barnum* (2003) 29 Cal.4th 1210, 1227, fn. 3 and authorities cited.) Ruling the subject was now made relevant by defendant's answer on direct examination was not "an arbitrary, capricious, or patently absurd" exercise of the trial court's discretion to decide the admissibility of evidence. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1108; *People v. Goldsmith* (2014) 59 Cal.4th 258, 266.)

But was it an abuse of the court's discretion under Evidence Code section 352? The standard of reversal is just as high: "A trial court's discretionary ruling under this statute ' "must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" ' [Citation.]" (*People v. Williams* (2008) 43 Cal.4th 584, 634–635.) "[T]he test for prejudice under Evidence Code section 352 is not whether the evidence in question undermines the defense or helps demonstrate guilt, but is

whether the evidence inflames the jurors' emotions, motivating them to use the information, not to evaluate logically the point upon which it is relevant, but to reward or punish the defense because of the jurors' emotional reaction." (*People v. Valdez* (2012) 55 Cal.4th 82, 145.) In other words, does admission pose " 'an intolerable "risk to the fairness of the proceedings or the reliability of the outcome[?]" ' " (*People v. Jablonski*, *supra*, 37 Cal.4th 774, 805.)

We conclude not. The circumstances of the brother's shooting were not inflammatory. The incident was 26 years in the past when the charged offense occurred, and far less gruesome. The jury knew that the shooting was examined by law enforcement and that no charges were brought.[1] The obvious conclusion is that, officially, there was no crime. In these circumstances, the jury would have little incentive to punish defendant. That it acquitted defendant of first degree murder with a torture special circumstance shows this was not a jury unhinged from reason by animus toward the accused. Admission of the brother's death thus did not entail " 'an intolerable "risk to the fairness of the proceedings or the reliability of the outcome," ' " and thus was

[1] At oral argument, counsel for defendant stated that the prosecutor expressly referred to the brother's death as "murder." Similarly, the brief asserts that the prosecutor was "able . . . to imply through cross-examination that it [the brother's death] was murder," and, citing "RT 751," and "urged the jury to consider the 1986 shooting as another murder." The record does not bear this out.

Once the trial court allowed the subject to be explored, the prosecutor twice asked defendant whether he was interviewed "about whether or not [he] committed a murder." The redirect questions by defense counsel used the words "accidental" and "killing." In her recross, the prosecution adopted the latter ("Mr. Collin, the day that Tim was killed . . . "). None of these expressions or characterizations was strictly inaccurate.

Obviously, at the first stage of the investigation of the brother's death, the police were examining whether the shooting was inadvertent or a criminal homicide. Then, shortly before closing arguments, the brother's death certificate—listing his death as accidental—was received in evidence. After the death certificate was in evidence, in his closing argument, defense counsel twice used the bland language of "the shooting in 1986." In her final argument, the prosecutor—at pages 750 and 751 of the reporter's transcript—made two references to defendant having "killed" his brother. Again, none of these characterizations was literally inaccurate. There was a shooting, and defendant's brother had been killed.

not an abuse of the trial court's broad discretion under Evidence Code section 352. (*People v. Jablonski*, *supra*, 37 Cal.4th 774, 805.)

Because the evidence was not admitted for propensity but in conformity with California's established rules of evidence, there is no federal constitutional dimension. "The 'routine application of state evidentiary law does not implicate [a] defendant's constitutional rights.' " (*People v. Hovarter* (2008) 44 Cal.4th 983, 1010.) Application of Evidence Code section 352 is within this principle. (E.g., *People v. Brown* (2003) 31 Cal.4th 518, 545; *People v. Robinson* (2005) 37 Cal.4th 592, 625–627.) Defendant's claim to the contrary consequently fails. So too does his related argument that his trial counsel should be branded as constitutionally incompetent if his failure to object resulted in the constitutional claim being forfeited. Because we have addressed the merits of the claim, any issue relating to not addressing those merits is entirely academic.

Evidence Regarding Other Cutting Instruments Found At Defendant's Home

Defendant frames his next contention as follows:

"It was settled that the machete found on Mr. Nielson's garbage can, covered in blood, hair, and tissue, was the weapon used to kill Ms. Devera. However, Collin had a workshop with a large collection of axes and machetes. The prosecutor requested admission of photographs of the tools as possible weapons. Defense counsel summarized the prosecutor's purpose for requesting admission of the photographs: 'I mean, they could be potential weapons; is that the idea?'

"[The] Court allowed photographs of all the axes and machetes owned by Mr. Collin. The prosecutor argued: 'If the machete hadn't come from this workroom, I would agree that it would have less relevance. But the fact that it was specifically taken out of that empty sheath and selected amongst all of these other potential defensive or offensive weapons, he picked the most lethal I think is entirely relevant to his intent to assault.' "

Defendant contends that by permitting use of these photographs the trial court abused the discretion granted it by Evidence Code section 352. Initially, we note that the

trial court appears not to have considered this claim, because no objection based on this statute was made by the defense. The sole objection made, and thus the only one ruled upon, was relevance. Even if such an objection had been made and rejected, the ruling would not qualify as reversible error. (See *People v. Partida* (2005) 37 Cal.4th 428, 435 ["A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct."].)

It must be recalled that the issue arose when defendant was facing a charge of first degree murder with the special circumstance that the murder was "intentional and involved the infliction of torture." (Pen. Code, § 190.2, subd. (a)(18).) As stated by the court in one of its instructions: "The defendant has been prosecuted for first degree murder under two theories: (1) 'the murder was willful, deliberate, and premeditated' and (2) 'the murder was committed by torture.' " The photographs would obviously be relevant to either theory for the reason given by the prosecutor.

The Trial Court Did Not Err in Failing to Instruct on the Defense of Unconsciousness

"All persons are capable of committing crimes except those . . . . [¶] . . . [¶] Persons who committed the act charged without being conscious thereof." (Pen. Code, § 26, subd. Four.) Defendant contends that, notwithstanding the absence of a request from him, the trial court had an independent duty to instruct the jury with CALCRIM No. 3425 that defendant was not guilty of murder if he acted while unconscious. Defendant is mistaken.

The statutory concept of unconsciousness has a distinct legal meaning. "To constitute a defense, unconsciousness need not rise to the level of coma or inability to walk or perform manual movements; it can exist 'where the subject physically acts but is not, *at the time*, conscious of acting.' " (*People v. Halvorsen* (2007) 42 Cal.4th 379, 417, italics added.) In approaching the issue, courts "begin with the presumption that a person who appears to act in an apparent state of consciousness is conscious. [Citation.] Therefore, the burden is on a criminal defendant to produce evidence rebutting this presumption of consciousness." (*People v. James* (2015) 238 Cal.App.4th 794, 804.)

"A trial court . . . has a duty to instruct on . . . a particular defense only if it appears the defendant is relying on such a defense, or substantial evidence supports the defense and it is consistent with the defendant's theory of the case." (*People v. Booker* (2011) 51 Cal.4th 141, 179.) Defendant obviously did not rely on unconsciousness. His theories of defense at trial were that: (1) his frenzied overreaction to a nonlethal threat showed no premeditation, deliberation, or malice; and (2) he acted in imperfect self-defense, which is based on the perception of a non-delusional threat, thus reducing the conceded killing to voluntary manslaughter. (See Pen. Code, § 188 [definitions of actual and implied malice]; *People v. Elmore* (2014) 59 Cal.4th 121, 133–136 ["Self-defense, when based on a *reasonable* belief that killing is necessary to avert an imminent threat of death or great bodily injury, is a complete justification, and such a killing is not a crime. [Citations.] A killing committed when that belief is *unreasonable* is not justifiable. Nevertheless, 'one who holds an honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury does not harbor malice and commits no greater offense than manslaughter.' "].) Both theories assume the defendant's cognitive awareness of his actions. Unconsciousness was inconsistent with these defenses.

Nor was it supported by substantial evidence. Defendant presented no expert testimony, only his own testimony as to his *partial* recollection, which he argues is enough. In *People v. Rogers* (2006) 39 Cal.4th 826, the defendant was convicted of the first degree murder of Clark and the second degree murder of Benintende. The reasoning by our Supreme Court is dispositive:

"Here, defendant did not apparently rely upon the defense of unconsciousness. No expert testified that defendant was unconscious during either killing; nor did defendant himself testify he was unconscious, but only that he could not later recall the killings. Further, defense counsel during argument did not articulate a theory of unconsciousness.

"Accordingly, the trial court was obligated to instruct on that defense only if substantial evidence supported it. Defendant contends his testimony that he had no independent memory of the Clark killing from the time he pushed the victim out of the

truck, coupled with expert testimony suggesting that defendant 'blacked out' and could not remember the incident, warranted an unconsciousness instruction with respect to the Clark count. (See *People v. Wilson* (1967) 66 Cal.2d 749, 762–763 [unconsciousness instruction warranted where defendant testified he did not remember shootings and was 'distraught and mentally exacerbated' by the events preceding the shootings].) The defense experts' testimony, however, fairly read, does not imply that he was unconscious during the events. Rather, it suggests he was aware of the events as they were occurring, but reacted to them emotionally rather than logically. For example, Dr. Glaser testified the killing was an emotional, 'impulsive heat of passion event,' and Dr. Bird testified the killing was an impulsive, emotional act of passion and fear. Further, defendant's own testimony that he could not remember portions of the events, standing alone, was insufficient to warrant an unconsciousness instruction. (*People v. Froom* (1980) 108 Cal.App.3d 820, 829–830 [evidence defendant was forgetful and told a psychiatrist he 'awakened' after the crime was committed did not entitle defendant to an unconsciousness instruction]; *People v. Heffington* (1973) 32 Cal.App.3d 1, 10 [there is no 'ineluctable rule' that a defendant's inability to remember supplies an evidentiary foundation for an unconsciousness instruction]; cf. *People v. Coston* (1947) 82 Cal.App.2d 23, 40 ["a defendant's mere statement of forgetfulness, unsupported by any other evidence, is at most very little evidence of unconsciousness at the time of performing a particular act"].)

"The only evidence supporting an unconsciousness instruction with regard to the Benintende count was defendant's confession and his testimony that he had 'no memory' of that killing. Defendant's experts did not testify regarding his mental state during that killing, and there was no other evidence of the circumstances surrounding that crime. Defendant's professed inability to recall the event, without more, was insufficient to warrant an unconsciousness instruction." (*People v. Rogers*, *supra*, 39 Cal.4th 826, 887–888.)

In his testimony, defendant remembered everything necessary for his claim of

self-defense. He testified to the victim possibly making a move toward a knife. He remembered having the machete in his hand, and remembered raising it, but not actually using it on the victim. He testified to having no felonious intent. He also remembered immediately succeeding events, namely, walking to the neighbor, knowing "I killed Eva," intending to tell that to the neighbor, and to the officers that would be summoned. The uncontradicted evidence is that defendant was indeed " 'conscious of acting' "—and, thus, not unconscious. (*People v. Halvorsen*, *supra*, 42 Cal.4th 379, 417.) This was far from the comprehensive, and explained, memory loss that would require the trial court on its own initiative to instruct on unconsciousness.

There Was No Cumulative Error

Defendant's final claim is "the cumulative error" requires reversal. However, the preceding discussion establishes that the predicate for the claim—that there was accumulated error—is absent.

DISPOSITION

The judgment of conviction is affirmed.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Stewart, J.

A144836; *P. v. Collin*